No. 93-1286

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

AMERICAN AIRLINES, INC.,
Petitioner,
v.
MYRON WOLENS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does the express preemption clause of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305, preempt only those state law claims that relate to "essential" airline operations?

2. Does the scope of preemption under Section 1305 depend on the form of relief requested?

RULE 29.1 STATEMENT

Petitioner is wholly owned by AMR Corp., a Delaware corporation, and owns 49% of DFW Terminal Corp., a Texas corporation, and 50% of American Holidays, Ltd., a U.K. corporation.

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OPINION BELOW

A prior opinion of the Illinois Supreme Court in this case is reported at 589 N.E.2d 533, and is reproduced in the Appendix to the Petition for Certiorari (Pet. App.) at 20a. That opinion was vacated by this Court in *American Airlines v. Wolens*, 113 S. Ct. 32 (1992), reproduced at Pet. App. 19a. The opinion and judgment of the Illinois Supreme Court on remand is reported at 626 N.E.2d 205, and is reproduced at Pet. App. 1a.

JURISDICTION

The judgment of the Illinois Supreme Court on remand was entered on December 16, 1993. The petition for certiorari was filed on February 8, 1994, and was granted on April 4, 1994. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the express preemption clause of the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. App. § 1305(a)(1) ("Section 1305"), which provides in relevant part as follows:

(a) Preemption

(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

STATEMENT OF THE CASE

A. Introduction.

In 1978, Congress passed the Airline Deregulation Act to bring innovative free market competition to the airline industry. To advance that objective, Congress expressly preempted the enactment or enforcement of state law "relating to rates, routes, or services" offered by airlines. 49 U.S.C. App. § 1305(a)(1). In *Morales v. Trans World Airlines Inc.*, this Court gave the statute's "sweeping" language its "commonsense" meaning, and held that Section 1305 preempts all state law having a "connection with" or "reference to" airline rates, routes, or services, even if the law would not "regulate" or "prescribe" rates, routes, or services, and even if the law's effect on rates, routes, or services is "only indirect." 112 S. Ct. 2031, 2037 (1992).

This case involves the application of Section 1305 to a state law challenge involving the rates and services offered through an airline's frequent flyer program. Like all other

airlines, Petitioner American Airlines has modified its frequent flyer program over the years in response to market pressures.[1] At issue here is American's May 1988 announcement of "capacity control" restrictions for frequent flyer travel. Respondents, purporting to represent a nationwide class, have alleged that these capacity controls violated the Illinois Consumer Fraud Act and breached an implied contract.

On remand for reconsideration in light of *Morales*, the Illinois Supreme Court held that Section 1305 preempted respondents' statutory and common law claims insofar as they sought injunctive relief. That ruling was plainly correct, and respondents do not challenge it. However, the state court refused to preempt respondents' claims for compensatory and punitive damages *based on the identical allegations*. That ruling ignored the test for preemption established in *Morales*, and ignored the direct effect respondents' claims would have on American's rates and services. It must be reversed.

B. Background.

In 1978, Congress passed the ADA to "entirely overhaul the aviation regulatory system." H.R. Conf. Rep. No. 1779, 95 Cong., 2d Sess. 56 (1978).[2] The ADA

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[1] American is an interstate and international air carrier incorporated in Delaware with its principal place of business in Fort Worth, Texas. All parties to the proceedings below are listed in the caption to the petition for certiorari.

[2] *See also* H.R. Rep. No. 1211, 95th Cong., 2d Sess. 1-3 (1978). During much of this century the federal government comprehensively regulated the air travel industry, including airline rates, routes, and services. In 1938 Congress established the Civil Aeronautics Board, and gave it comprehensive authority to determine all aspects of airline competition. *See* Civil Aeronautics Act of 1938, 52 Stat. 980. In 1958 Congress passed the Federal Aviation Act, and gave the Federal Aviation Administration responsibility for regulating all aspects of airline safety. *See* Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731. *See generally* Congressional Budget Office, Policies for the Deregulated Airline In-

abolished rate regulation, lowered official barriers to entry, and removed other restrictions on competition between carriers. In general, Congress sought to place "maximum reliance on competitive market forces" to further "efficiency, *innovation* and low prices" as well as the "variety [and] quality . . . of air transportation services." *Morales*, 112 S. Ct. at 2034 (emphasis added). Congress expressly instructed the CAB (now the Department of Transportation) to exercise its remaining regulatory authority to "encourage" competition.[3] As an integral part of this procompetitive plan, Congress determined that the diverse requirements of state law should not interfere with the principal ways airlines compete for passengers, and expressly preempted all state law "relating to [the] rates, routes, or services of any air carrier." 49 U.S.C. App. § 1305.

The ADA unleashed fierce competition and brought substantial benefits to consumers. Airlines have reduced fares, expanded route networks, and introduced innovative services designed to attract passengers.[4] Frequent flyer programs are one of the most significant competitive innovations resulting from deregulation. In 1981 American introduced the first such program, the "AAdvantage"

dustry, 1 (July 1988). The ADA deregulated the CAB's authority to regulate rates, routes, and services, but not the FAA's authority to regulate safety. *Id.*

[3] *See* 49 U.S.C. App. § 1302(a)(4) ("maximum reliance on competitive market forces and on actual and potential competition"); § 1302(a)(9) ("encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices and to determine the variety, quality, and price of air transportation services").

[4] According to the National Commission to Ensure a Strong Competitive Airline Industry, the airline industry now "[c]harges travelers and shippers less in real terms than it did in 1978." *Change, Challenges and Competition: A Report to the President and Congress* (1993) at 1. The Commission was established by Section 204 of the Airport Safety, Capacity, Noise Improvement and Intermodal Transportation Act of 1992, 49 U.S.C. App. § 1371 note ("1992 Airport Act").

program. American's competitors quickly followed suit, and today every major airline has its own program. Overall, airline frequent flyer programs have more than 30 million members.[5]

AAdvantage members accrue mileage credits when they fly on American. They can then use those credits, subject to the terms and conditions of the program, to buy tickets to fly on domestic or international routes, or to pay for upgrades to a higher level of service. AAdvantage members thus purchase airline services by redeeming accrued mileage at rates set by American. Whether tickets are purchased with cash or with AAdvantage credits, or with a combination of the two, the essence of the transaction is that American is charging specified rates for the primary service it offers—air travel.[6]

As DOT found in a comprehensive 1990 study of the airline industry, frequent flyer programs "have proven to be an extremely effective marketing practice for differentiating airline services." 1990 DOT Report, at 3. *See also id.* at 28-29, 38; DOT Order 92-5-60 (May 29, 1992), Pet. App. 99a ("carriers use their [frequent flyer] programs as a means of competing for passengers"). As DOT noted, "[m]any travellers have a preference for one carrier, often because of frequent flyer program member-

[5] U.S. Department of Transportation, Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, *Airline Marketing Practices*, at 40 (Feb. 1990) ("1990 DOT Report").

[6] Mileage credits can be earned in a variety of other ways and can also be exchanged for services that do not involve air travel. Those non-flight services were not challenged in this litigation, in which respondents' only claim is that they have unlawfully been denied the right to use their frequent flyer mileage credits to purchase airline tickets on particular days at particular rates. In any event, airline travel awards for free or upgraded service are the primary benefit provided by frequent flyer programs. *See* 1990 DOT Report, at 34 ("Frequent flyer mileage-level awards are principally airline travel awards for free or upgraded service on the plans' participating airlines").

ships." 1990 DOT Report at 28. Frequent flyer programs are particularly important in attracting the "most lucrative segment of airline traffic—the full fare business travellers." *Id.* at 3.

Competition has spurred airlines to "greatly expand[] the kinds of awards that members can obtain and the ways in which members can accumulate award miles in order to make [frequent flyer] program[s] more attractive" to consumers. 1992 DOT Order; Pet. App. 99a. For example, the AAdvantage program was initially a *temporary* promotion offering air travel to a limited number of destinations for a one year period. Responding to competition, American extended the AAdvantage program, which is now in its fourteenth year. During that time, to compete more effectively, American has expanded its route system to serve popular but previously unavailable destinations such as the Caribbean, Europe and the Far East, and has made all of that expanded route system available for purchase with AAdvantage mileage credits. American has also entered into partnerships with other domestic and foreign airlines to allow AAdvantage members to purchase tickets to an even broader array of destinations. Mileage credits accumulated before these increased benefits were made available can be used to obtain the new benefits.

Over time, however, competitive pressures have required airlines to adjust the allocation of seats among full fare passengers, discount fare passengers, and passengers paying for tickets with frequent flyer mileage credits. As program benefits expanded year after year, and passengers continued to accumulate mileage credits, airlines have found it necessary to control the number of seats available for purchase with frequent flyer credits. Without such "capacity control" restrictions, frequent flyer programs would simply become too expensive, because frequent flyers would displace too many revenue-generating passengers. Thus, as DOT has recognized, unless airlines can use "capacity controls" to sustain an

appropriate mix of passengers, frequent flyer programs would have to be terminated or severely curtailed. *See* 1990 DOT Report, at 3 (frequent flyer programs are economically feasible only if there is "minimal substitution between frequent flyer awards and airline services that would have been purchased in any case"). For this reason, DOT has concluded that capacity controls are "legitimate methods for controlling the cost of frequent flyer plans." 1992 DOT Order 92-5-60, Pet. App. 100a.

C. Respondents' Challenge.

Respondents are residents of Illinois, California and Connecticut, and purport to represent a nationwide class "consisting of approximately four million" AAdvantage members "wishing to pay for flights with free travel awards." [7] They sued American in Illinois state court, challenging American's May 1988 announcement of capacity control restrictions on the number of seats available to passengers purchasing tickets with AAdvantage credits. The restrictions applied to mileage credits accumulated either before or after the May 1988 announcement.[8]

Respondents alleged that the capacity controls announced in May 1988 violated their state statutory and common law rights to "redeem their American AAdvantage award certificates for *free air travel on any available date . . . for any available seat in the class of service provided*." [9] According to respondents, the capacity con-

[7] Tucker Complaint, Count I, ¶ 7; Pet. App. 63a.

[8] Tucker Complaint, Count I, ¶ 8; Pet. App. 63a.

[9] Wolens Complaint, Count I, ¶ 13; Pet. App. 52a (emphasis added). Respondents also alleged that American imposed "blackout dates" on which no seats would be available for purchase with frequent flyer credits. Their claims focus, however, on the imposition of capacity controls, presumably because the blackout dates apply only to tickets purchased with mileage credits accumulated after May 1988.

trols at issue "reduced the benefits theretofore available" to them by "significantly limit[ing] the number of seats available for passengers that wish to pay for travel with Program travel awards."[10] Respondents also alleged that these capacity controls raised the rate for tickets purchased with AAdvantage miles, because the capacity controls could be avoided only by redeeming a higher number of mileage credits.[11]

Respondents alleged that American's conduct violated the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121½, sec. 261 *et seq.*, which requires that "all material terms and conditions relating to" a promotional offer be "clearly and conspicuously disclosed" at the "outset" of the offer so as to leave "no reasonable probability" that the offering "might" be misunderstood. . *Id.* Respondents admitted that prior to May 1988 American had "reserved the right to restrict, suspend, or otherwise alter aspects of the Program" in its communications with AAdvantage members.[12] For example, American's April 1987 AAdvantage rules brochure expressly provided that "AAdvantage program rules, regulations, travel awards and special offers are subject to change without notice," and provided that American "reserves the right to terminate the AAdvantage program at any time."[13] Respondents nevertheless

[10] Wolens Complaint, Count I, ¶ 4; Pet. App. 50a. Respondents noted that *other* changes announced in the May 1988 announcement applied "to mileage credits earned and accrued thereafter," Tucker Complaint, Count I, ¶ 14; Pet. App. 65a, but their claims challenge only changes that applied to "mileage credits which plaintiff and other members of the Class had earned and accumulated prior" to that announcement. *Id.* at ¶ 14; Pet. App. 65a; Wolens Complaint, Count I, ¶ 15; Pet. App. 52a-53a. *See* Brief in Opposition (No. 93-1286), at 3-4.

[11] Tucker Complaint, Count I, ¶¶ 14-18; Pet. App. 65a-66a.

[12] Tucker Complaint, Count I, ¶ 12; Pet. App. 64a. *See* Brief in Opposition (No. 93-1286), at 4.

[13] The brochure is part of the record below, and has been lodged with the Clerk of the Court.

contended that American's express reservation did not satisfy the disclosure requirements of the Illinois Consumer Fraud Act.

Respondents also alleged that the *same conduct* breached common law contractual obligations. According to respondents, American's advertisements and communications "in diverse national media and by general mailings and distribution of promotional materials" induced respondents to choose American over competing airlines.[14] Respondents contend that American's statements, in the aggregate, amounted to an implied promise that accumulated miles could be redeemed at any time in the future at the benefit levels in effect at whatever time the miles were accumulated.[15] As a matter of state law, respondents contend, American's express reservation of the right to restrict AAdvantage benefits could not limit or condition this alleged implied promise. Thus, respondents claim, American's May 1988 capacity control announcement constituted a breach of contract.[16]

Respondents sought two forms of relief for each alleged state law violation: (i) an injunction to force American to redeem mileage credits accumulated before May 1988 for the same AAdvantage fares and unrestricted seating respondents allegedly could have obtained before that date, and preventing "retroactive application" of any future changes in the program;[17] and (ii) compensatory and punitive damages. To obtain a judgment ordering either form of relief, respondents would have had to ob-

[14] Wolens Complaint, Count I, ¶¶ 2, 10; Pet. App. 49a, 51a.

[15] Wolens Complaint, Count I, ¶ 11, Pet. App. 51a-52a (respondents "accrued a contractual right to receive . . . the benefits to which said mileage credits were entitled under the Program in effect when the mileage credits were earned").

[16] Wolens Complaint, Count I, ¶ 15; Pet. App. 52a-53a.

[17] Tucker Complaint, Count I, Prayer C; Pet. App. 67a.

tain an identical declaration of their rights under Illinois law.

D. Judicial Proceedings.

1. *The Trial Court's Decision.*

American moved to dismiss on the ground that respondents' claims related to American's "rates, routes, or services," and were therefore preempted by Section 1305. The trial court denied American's motion but certified an interlocutory appeal. Pet. App. 41a.

2. *The Illinois Supreme Court's Initial Decision.*

After an intervening appellate court decision (Pet. App. 31a), the Illinois Supreme Court held that Section 1305 preempted respondents' statutory and common law claims for injunctive relief because such "relief would involve the regulation of defendant's services." Pet. App. 23a. The court then ruled, however, that Section 1305 did not preempt respondents' identical "claims for *damages* for breach of contract and violation of the Consumer Fraud Act." Pet. App. 23a (emphasis added). The court held that "section 1305(a)(1) pre-empts claims *only when* the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services." Pet. App. 23a (emphasis added; quotation omitted). The court frankly stated it had "narrowly construed" Section 1305. Pet. App. 24a.

Chief Justice Miller disagreed with the majority's view that preemption depends on "whether the State law at issue is general or specific." Pet. App. 25a. He nonetheless concurred in the judgment. In his view, Section 1305 did not preempt respondents' damage claims because those claims were "not regulatory in force or effect" and "do not establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide." Pet. App. 28a.

3. *This Court's Prior Decision.*

After the Illinois Supreme Court's initial decision, this Court rendered its first definitive construction of Section 1305 in *Morales v. Trans World Airlines, Inc.* Unlike the Illinois Supreme Court, this Court gave Section 1305 a "broad" and "expansive" interpretation. 112 S. Ct. at 2037. *Morales* held that state law "relates to" airline "rates, routes or services," and is therefore preempted by Section 1305, if it has a "connection with or reference to" rates, routes, or services—"even if the law is not specifically designed" to regulate airlines and even if its effect is "only indirect." *Id.* at 2033, 2038. *Morales* found it "utterly irrational" that "state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general" law. *Id.* at 2038. Applying this test, the Court held that Section 1305 preempted enforcement of the Texas consumer protection statute against airline fare advertisements.

After *Morales* was decided, American petitioned for certiorari in this case, arguing that the Illinois Supreme Court's decision relied on precisely the distinction *Morales* rejected—between general laws and laws that "specifically" relate to airline rates, routes, or services. Respondents did not cross-petition. They conceded that the state court's decision to preempt their statutory and common law injunctive claims was "carefully reasoned" and "fully consistent" with *Morales* because injunctive relief "would require the court to regulate the manner in which American provided its passengers transportation services." [18] Seeking to distinguish their damage claims, respondents argued that damages, unlike an injunction, would not directly regulate American's conduct.[19]

This Court granted American's petition for certiorari, vacated the Illinois Supreme Court's judgment, and re-

[18] Brief in Opposition (No. 92-249), at 9.

[19] *Id.* at 9-11.

manded for reconsideration in light of *Morales*. *American Airlines, Inc. v. Wolens*, 113 S. Ct. 32 (1992); Pet. App. 19a.

4. *The Illinois Supreme Court's Decision on Remand.*

On remand, after reaffirming preemption of respondents' injunctive claims, the Illinois Supreme Court concluded that its "previous holding that plaintiffs' claim for money damages was not preempted . . . comports with the *Morales* decision." Pet. App. 2a, 6a. The court gave two new reasons for this ruling. *First*, the court concluded that "[a] frequent flyer program is not an essential element to the operation of an airline" because "the airline industry functioned successfully for decades" without frequent flyer programs. Pet. App. 6a. Therefore, in the court's view, respondents' damage claims would have only a "peripheral" or "tangential" effect on essential airline operations. Pet. App. 6a. *Second*, expressly adopting the test for preemption urged in Chief Justice Miller's prior concurrence, the court concluded that because respondents were seeking "*only* money damages," Pet. App. 6a (emphasis added), their claims did not "seek to 'establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide.'" *Id.* (quoting prior concurring opinion of Chief Justice Miller).

Justice McMorrow dissented. She noted that "reduced to their simplest terms, plaintiffs' claims . . . are based upon allegations of American's deceptive advertising, promotions, and inducements relating to airline fares (i.e., payment of travel fares with mileage credits and upgrades in seating class[es]) and services (i.e., the quantity of seats and flights and the dates of travel to various destinations)." Pet. App. 12a. Recognizing that *Morales* gave an "expansive and sweeping interpretation of the phrase 'relating to'," Justice McMorrow concluded that "plaintiffs' [compensatory and punitive damages] claims have a connection with and relation to American's rates and

services, and are preempted by section 1305(a)(1) of the Deregulation Act." Pet. App. 13a, 14a, 16a.

Justice McMorrow stressed that *Morales* "rejected a contention essentially the same as that made by Justice Miller in his special concurrence to [the state] court's previous opinion *and now adopted by the majority*, that plaintiffs' claims are not preempted because they do not seek to 'establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide.'" Pet. App. 9a (quoting majority opinion; emphasis added). In Justice McMorrow's view, Section 1305 applied equally "whether plaintiffs seek [an injunction] to enforce the terms and conditions of the program or an award of money damages for American's alleged breach of those contractual obligations." Pet. App. 13a. As she explained, a finding that American violated state law was equally "necessary whether plaintiffs seek to enforce the terms and conditions of the program or an award of money damages for American's alleged breach of those contractual obligations." Pet. App. 13a. In particular, she noted that respondents sought a state law declaration requiring American to "continue to redeem mileage credits earned prior to May 1988 for the same free fares and unrestricted seating and flight services which the AAdvantage program [allegedly] provided up until that time." *Id.*

SUMMARY OF ARGUMENT

Section 1305 expressly preempts the claims pursued here by respondents. The statutory language, on its face, bars States from entertaining *any* causes of action that relate to "rates, routes, or services." Moreover, the application of that statutory language to bar the claims in this case is mandated by *Morales*, a case that is indistinguishable from this one. Both cases involve claims under state consumer fraud acts challenging the way airline services were offered to the public. *Morales* made clear that such laws fall within Section 1305 because they have a "connection with or reference to" airline rates, routes, or services. *Morales* also made clear that claims for damages for breach of contract under state common law would be equally preempted. In fact, *Morales* expressly relied on cases preempting contract claims under the similarly worded ERISA preemption provision.

At the most basic level, respondents have invoked state law to challenge American's decisions about how to allocate seats between revenue-generating passengers and frequent flyer passengers, and American's decisions about what rates to charge AAdvantage members for air transportation. The Illinois Supreme Court recognized as much when it correctly held that respondents could not pursue injunctive relief to bar implementation of those decisions. Respondents' damage claims are no different in nature or effect. The damage claims arise out of the same nucleus of operative fact and require the same declaration of state law rights. To have avoided the damages respondents seek, American would have had to allocate tens of thousands of additional seats to AAdvantage passengers using pre-1988 mileage credits, and correspondingly fewer to revenue-generating passengers. There is thus no justification for the state court's refusal to preempt all of respondents' claims.

Preemption would directly further the core objectives of the ADA. If basic airline decisions about how to compete were subject to the conflicting statutory and common law of fifty States, airlines would be forced to conform their decisions to the standards of the most restrictive state. The ADA was enacted to encourage innovative forms of competition. Subjecting competitive decisions to state law would discourage the very innovation the ADA was intended to promote.

Preemption will not leave passengers without meaningful remedies. As *Morales* noted, DOT has ample authority under Section 411 of the Federal Aviation Act to deal with unfair airline practices. DOT also has explicit statutory authority under 49 U.S.C. § 1371(q)(2) to require air carriers to provide "appropriate compensation" to "travelers" for "failure on the part of such carrier to perform air transportation services in accordance with agreements therefor." Unlike state law remedies, federal remedies will be uniform, and will be devised by an agency that is in a position (as state courts are not) to consider nationwide needs and circumstances. Moreover, the ADA expressly commands DOT to act consistently with the core statutory policy of placing maximum reliance on marketplace competition to "provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services." 49 U.S.C. App. § 1302(a)(9). State remedies are preempted for the very good reason that state courts need not consider, as DOT must, whether the requested remedies would discourage innovative forms of airline competition.

ARGUMENT

I. THE AIRLINE DEREGULATION ACT EXPRESSLY PREEMPTS RESPONDENTS' STATE STATUTORY AND COMMON LAW CLAIMS BECAUSE THOSE CLAIMS PLAINLY RELATE TO AMERICAN'S "RATES" AND "SERVICES".

A. Section 1305 Preempts Respondents' State Law Challenges To The Rates And Services American Decides To Offer Through Its Frequent Flyer Program.

Section 1305 is a clear textual mandate preempting the enactment or enforcement of any state "law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." As this Court recently held in *Morales*, the "relating to" language of Section 1305, like its ERISA counterpart, requires preemption of all state laws "having a *connection with* or *reference to*" airline rates, routes, or services. 112 S. Ct. at 2037 (emphasis added). The "connection with or reference to" standard "is true to the ordinary meaning of 'relate to' . . . and thus gives effect to the deliberately expansive language chosen by Congress." *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580, 583 (1992) (citing *Morales*).[20]

[20] Express preemption provisions, like all other statutory provisions, should be construed in accordance with their ordinary meaning, unless there are compelling indications that Congress intended a more restrictive meaning. *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993) ("express pre-emption clause . . . necessarily contains the best evidence of Congress' pre-emptive intent"); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990) ("Where, as here, Congress has expressly included a broadly worded preemption provision . . . [the] task of discerning congressional intent is considerably simplified"); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983) ("plain language [controls] unless there is good reason to believe Congress intended the language to have some more restrictive meaning"). *Cf. Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990).

Legislative history confirms this broad meaning. In conference, Congress rejected narrower language enacted by the Senate, which would have preempted only laws "determining" rates, routes, or services, and instead adopted the broader "relating to" standard. *See Morales*, 112 S. Ct. at 2038 n.2. Subsection (b) of Section 1305 also confirms the broad reading because it saves from preemption the exercise of state "proprietary powers and rights"—which would have been unnecessary if Congress intended Section 1305 to preempt only direct state regulation of rates, routes, or services. *Id. See also Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 98.

Section 1305 forecloses respondents' challenge. Although respondents have invoked state statutory and common law of general application, *Morales* left no doubt that Section 1305 preempts state law of "general applicability" to the extent that its "particularized application" relates to airline rates and services. 112 S. Ct. at 2038. Here respondents seek to apply state law to challenge American's 1988 decisions regarding the appropriate mix of full fare passengers and AAdvantage passengers on American flights, and the rate for unrestricted AAdvantage travel. That is precisely the kind of claim the statute preempts.

Respondents' pleadings make clear that their claims are based on American's rate and service decisions. The claims are pressed on behalf of "persons wishing to *pay for flights* with free travel awards."[21] Respondents flatly assert a right "to redeem their American AAdvantage award certificates for *free air travel on any available date . . . for any available seat in the class of service provided*" at AAdvantage rates in effect before May 1988.[22] That right was violated, they contend, "by the implementation of capacity control restrictions,"[23] which limited "the maximum number of seats allocated to persons wishing

[21] Wolens Complaint, Count I, ¶ 14; Pet. App. 52a (emphasis added).

[22] Wolens Complaint, Count I, ¶ 13; Pet. App. 52a (emphasis added); *see also* Wolens Complaint, Count III, ¶ 10; Pet. App. 55a-56a.

[23] Wolens Complaint, Count III, ¶ 15; Pet. App. 56a-57a.

to pay for flights with free travel awards," and by the increase in AAdvantage rates for travel without capacity control restrictions.[24] And they seek damages measured by the difference between the rates for unrestricted AAdvantage travel at pre-1988 levels and the rates for such travel after 1988.[25] *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48 (1990) ("common law cause of action . . . based on" conduct involving benefit plan "relates to" that plan under ERISA preemption provision); *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (common law cause of action "premised on" existence of benefit plan "relates to" that plan under ERISA preemption provision).

As their pleadings demonstrate, respondents seek to impose particular state law requirements on the airlines' competitive efforts to attract passengers through their frequent flyer programs. If not preempted, those requirements would cut to the heart of airline operations. That much is clear from what American would have had to do to minimize damages liability on respondents' claims: rescind its May 1988 capacity control decision and make an unlimited number of unrestricted seats available to passengers seeking to redeem AAdvantage credits accumulated before May 1988.

Such a forced change would be highly disruptive. Each seat provided to an AAdvantage member is a seat that cannot be sold to a full fare or discount fare passenger. Invariably, therefore, fewer seats would be available for other passengers if the 1988 capacity control restrictions were rescinded. Some full fare business passengers, particularly on peak flights, would be displaced, resulting in lower revenues per flight. Alternatively, to protect seats for full fare passengers on those flights, American would have to further restrict the seats available for discount fare passengers and for passengers seeking to redeem post-1988 AAdvantage credits. If allowed to proceed, therefore, respondents' claims would affect American's revenues, seat allocations and pricing decisions in a direct and fundamental way. And the risk of such damage awards would certainly inhibit future competitive innovations.

[24] Wolens Complaint, Count I, ¶ 14; Pet. App. 52a; *see also* Wolens Complaint, Count I, ¶ 4; Pet. App. 50a; Tucker Complaint, Count I, ¶ 14; Pet. App. 65a.

[25] Wolens Complaint, Count I, Prayer B; Pet. App. 53a (damages sought in "the amount that the value of the mileage credits earned . . . prior to May 18, 1988 . . . was reduced" by capacity controls).

In this respect, the "connection with" airline rates and services is even stronger here than it was in *Morales*. In *Morales*, this Court found a sufficient "connection" between the Texas law at issue and airline rates because violation of that state law could hypothetically give "consumers a cause of action for at least actual damages," since they would have "an enforceable right to [a discount] fare when the advertisement [for that fare] fails to include the mandated explanations and disclaimers." 112 S. Ct. at 2039. Because the consumer claim was hypothetical in *Morales*, the airlines could avoid liability simply by changing their future advertisements to include the information state law required, without changing the underlying rates they offered. In this case, respondents have actually brought precisely the kind of damage claims hypothesized in *Morales*, and have done so as a nationwide class. American could not avoid liability simply by including the "mandated explanations and disclaimers" in future communications. American would have to change the future allocation of seats among various classes of passengers, and would have to charge a different mix of rates than it would otherwise charge.

The state law respondents seek to enforce here would also impose prospective obligations that have a "connection with" American's rates and services at least as strong as the connection found in *Morales*. Just as

the Texas law at issue in *Morales* "establish[ed] binding requirements as to how tickets are to be marketed if they are to be sold at all," 112 S. Ct. at 2040, the Illinois laws at issue here would impose binding requirements as to how frequent flyer programs can be marketed. Those requirements would have the same "significant effect" as the laws at issue in *Morales*. *Id.* at 2039.[26] In *Morales*, the Court noted that burdensome disclosure requirements would severely constrain the airlines' ability to impose capacity controls on discount fares, and hence their ability to offer discount fares in the first place. *Id.* The same is true here. Frequent flyer programs may well become prohibitively expensive without capacity controls because they will simply displace too many revenue-generating passengers.[27] Burdensome advance disclosure requirements can seriously impede an airline's use of capacity controls, and hence its ability to remain competitive in the volatile air transportation marketplace. Indeed, the frequent flyer portion of the NAAG Guidelines—to which Illinois is a signatory—imposes disclosure requirements much like the discount fare disclosure requirements invalidated in *Morales*. *See* 112 S. Ct. at 2041 (reprinting Guidelines).

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[26] In any event, preemption under Section 1305 does not require a showing of significant effect. A state law "relates" to airline rates, routes, or services if it has a "connection with or reference to" those rates, routes, or services, and, as under ERISA, is preempted "on that basis alone." *Greater Washington Bd. of Trade*, 113 S. Ct. at 583. Because this case involves express preemption, state law is ousted whether or not it conflicts with federal objectives. *Morales*, 112 S. Ct. at 2038.

[27] Airlines know, for example, that Monday morning flights between Dallas and New York are likely to attract substantial numbers of full fare business travellers. Conversely, there will be relatively few full fare business travellers on flights between Los Angeles and Hawaii. Since most of the seats on the Hawaiian flights will be occupied by persons using frequent flyer awards or discount fares, it is important that a sufficient number of seats on the Monday morning Dallas/New York flights are available for purchase by full fare passengers.

This case cannot be distinguished from *Morales* on the ground that respondents have alleged common law claims as well as statutory claims.[28] Surely, the result in *Morales* would not have been different if state common law contract claims based on discount fare advertisements were also at issue. Common law is plainly "law" within the meaning of Section 1305.[29] Respondents' common law claims have precisely the same "connection with or reference to" American's rates and services as do their statutory claims. As this Court's ERISA precedents make clear, the "relating to" language of Section 1305 encompasses common law contract claims as well as statutory claims. *See Pilot Life*, 481 U.S. at 43-44. Indeed, *Morales* specifically held that the statutory claims at issue there were "much like" the "common law . . . contract" claims at issue in *Pilot Life*, and should be found to "relate to" airline rates, routes, and services for the same reason the common law claims at issue in *Pilot Life* were found to "relate to" employee benefit plans under ERISA. *Morales*, 112 S. Ct. at 2039.[30]

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[28] The Illinois Supreme Court ruled that respondents' contract claims *do* "relate to" American's rates, routes, or services, insofar as those claims sought injunctive relief (Pet. App. 2a, 23a), and respondents do not challenge that ruling. Brief in Opposition (No. 93-1286) at 14a. Thus, the only dispute is whether the contract claims relate to rates, routes, or services insofar as they seek damages. That issue is addressed *infra*, Point I.B.

[29] *See Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992) ("[a]t least since *Erie R. v. Tompkins* . . . we have recognized the phrase 'state law' to include common law as well as statutes and regulations"); *Norfolk & W. R. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991) (phrase "all other law" does not "admit[] of a distinction between positive enactments and common-law liability rules"); *Easterwood*, 113 S. Ct. at 1737 (statute premepting any state "law, rule, regulation, order or standard" encompasses "legal duties imposed . . . by common law").

[30] In order to prevail on the *merits* of their contract claim, respondents will have to use *state* law to determine which of the many advertisements, newsletters, and other communications be-

Furthermore, it would elevate form over substance to preempt statutory but not common law claims. *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). In *Kalo Brick*, after finding a state statutory claim preempted by the Interstate Commerce Act, the Court observed that "[t]he same reasoning applie[d]" to the common law claims at issue "because they, too, are essentially attempts to litigate the [same] issues." 450 U.S. at 326. As the Court made clear, "compliance with the intent of Congress cannot be avoided by mere artful pleading." 450 U.S. at 324. The same must be true here.[31]

B. The Illinois Supreme Court's Decision Cannot Be Squared With Morales.

The Illinois Supreme Court's refusal to preempt respondents' damage claims flies in the face of *Morales*. Indeed, the state court's decision is inexplicable given its prior, unchallenged holding that Section 1305 preempts

tween American and the public embody the terms of the "contract" at issue, to determine precisely what those terms are, and then to determine whether American's express reservation of the right to restrict or terminate the AAdvantage program is for some reason unenforceable. *See generally Norfolk & W. R. Co.*, 499 U.S. at 129 (statutory phrase "laws" includes "obligations imposed by contract" because "the obligation of a contract is the law which binds the parties to perform their agreement," the "contract depends on a regime of common and statutory law for its effectiveness and enforcement," and "a contract has no legal force apart from the law that acknowledges its binding character") (internal quotations omitted).

[31] Section 1506, the so-called saving clause, does not help respondents. 49 U.S.C. App. § 1506. As *Morales* held, Section 1506 "cannot be allowed to supersede the specific substantive pre-emption provision" contained in Section 1305. 112 S. Ct. at 2037. Here, as under ERISA, savings or exemption clauses "do not limit the pre-emptive sweep . . . once it is determined that the law in question relates to" airline rates, routes or services. *Greater Washington Bd. of Trade*, 113 S. Ct. at 584. *See also International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

respondents' injunctive claims. Pet. App. 2a; Pet. App. 23a.

Seizing on dicta in *Morales*, the state court reasoned that respondents' damage claims were "too tenuous, remote or peripheral" to warrant Section 1305 preemption because frequent flyer programs are not "essential" to airline operations, and because "money damages" would not "establish" the rates, "determine" the routes, or "dictate" the services airlines offer. Even if the *Morales* dicta supported the decision below, and it does not, "[i]t is to the holdings of [this Court's] cases, rather than their dicta, that we must attend." *Kokkonen v. Guardian Life Ins. Co.*, No. 93-263, 1994 WL 183616, at *3 (May 16, 1994). Far from supporting the decision below, the holding in *Morales* directly refutes the state court's reasoning.

First, the state court's inquiry into whether frequent flyer programs were historically "essential" to airline operations is wholly insupportable. Nothing in the statutory text, this Court's ruling in *Morales*, or the broad legislative purposes of the ADA supports such an analysis. To the contrary, it is antithetical to the expansive "connection with or reference to" test established in *Morales*. Under the state court's "essentiality" analysis, airline practices postdating the ADA—including not only frequent flyer programs but also other competitive innovations such as American's Ultimate Supersaver deep discount fares—are not "essential" and therefore not preempted. By using a historical test to determine what airline operations are "essential," and therefore preempted, the Illinois Supreme Court would effectively permit States to regulate the very innovations Congress intended to encourage.[32] Indeed, the state court did not take its own

[32] Furthermore, quite apart from its historical focus, the Illinois Supreme Court's "essentiality" test would require state courts to make technical, expert judgments whether the conduct at issue concerns a part of the airline's business that is "essential" to its operations.

"essentiality" test seriously: it preempted respondents' injunctive claims even though they involved the identical "nonessential" frequent flyer services.

Second, as Justice McMorrow stressed in dissent, *Morales* squarely *rejected* the contention that Section 1305 "only preempts the States from actually prescribing rates, routes, or services," and held that such an interpretation "simply reads the words, 'relating to' out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to '*regulate* rates, routes, and services.'" Pet. App. 16a (quoting *Morales*, 112 S. Ct. at 2037-38 (emphasis in original)). Thus, *Morales* flatly rejected the key premise of the Illinois Supreme Court's decision on remand.

Accordingly, that decision can be upheld only if damages and injunctive relief warrant different treatment for preemption purposes—a point respondents candidly admit. *See* Brief in Opposition (No. 93-1286), at 14 (*Morales* permits "distinction between damage claims and claims for injunctive relief"). But this Court has consistently refused to distinguish between damage claims and injunctive claims under the similarly worded ERISA preemption provision. *E.g., Pilot Life; Ingersoll-Rand Co.* In *Morales*, the Court made clear that those ERISA precedents are fully applicable to Section 1305. Indeed, *Morales* expressly followed *Pilot Life*, which "held that a common-law tort and contract action *seeking damages* . . . was pre-empted by ERISA." *Morales*, 112 S. Ct. at 2039 (emphasis added).

This Court's preemption jurisprudence generally abjures distinctions based on the form of relief. *See Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959); *International Paper Co. v. Ouellette*, 479 U.S. 481, 498 n.19 (1987). In *Cipollone*, Justice Stevens' opinion (for four Justices) refused to distinguish between damages and injunctive claims, because

"'regulation can be as effectively exerted through an award of damages as through some form of preventive relief.'" 112 S. Ct. at 2620 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. at 247). *Accord Cipollone*, 112 S. Ct. at 2632, 2634 (Scalia and Thomas, JJ., concurring). In *Ouellette*, the Court declined "to draw a line between the types of relief sought. . . . [U]nless there is evidence that Congress meant to 'split' a particular remedy for pre-emption purposes, it is assumed that the full cause of action under state law is . . . preempted." 479 U.S. at 499.[33]

Nothing in the text or legislative history of Section 1305, or the broad purposes of the ADA, even remotely suggests such an intent. To the contrary, as *Morales* makes clear, Section 1305 preempts state law having a "connection with or reference to" airline rates, routes, or services regardless of whether the preempted claim would have a regulatory effect on those rates and services. 112 S. Ct. at 2033. In any event, respondents' damage claims would be preempted even if such a showing were required. "'[T]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Cipollone*, 112 S. Ct. at 2620 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. at 247). *Accord Cipollone*, 112 S. Ct. at 2634 (Scalia and Thomas, JJ., concurring). Indeed, *punitive* damages are *intended* to be regulatory. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044 (1991); *Smith v. Wade*, 461 U.S. 30, 49 (1983).

Thus, for all these reasons, there can be no serious question that respondents' claims relate to American's rates

[33] Thus, where the Court has found that damages relief was not preempted, the text or legislative history of the provision at issue made clear that Congress intended a distinction between injunctive relief and damages. *See, e.g., Cipolione*, 112 S. Ct. at 2619; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249-256 (1984); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 n.1 (1988).

and services under the interpretation of Section 1305 adopted in *Morales*. Respondents do not dispute that *Morales* interpreted Section 1305 correctly. *See* Brief in Opposition (No. 93-1286), at 6 (no need to re-examine "the carefully considered—and recent—ruling in *Morales*"). That concession defeats their case because, as demonstrated, there is simply no principled basis on which this case may be distinguished from *Morales*, and no principled reason for departing from *Morales*. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 & n.34 (1986); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

II. PREEMPTION OF RESPONDENTS' CLAIMS DIRECTLY ADVANCES THE GOALS OF THE AIRLINE DEREGULATION ACT.

In any preemption case, "[t]he purpose of Congress is the ultimate touchstone." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). As this Court recognized in *Morales*, in the ADA Congress determined that " 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices,' as well as variety [and] quality . . . of air transportation services." 112 S. Ct. at 2034 (quoting 49 U.S.C. App. § 1302). Giving full effect to Section 1305's expansive *language* directly advances the ADA's core *purposes*.

Congress plainly expected airline competition to focus on the rates, routes, and services offered prospective passengers because these are the principal ways airlines can differentiate themselves in the marketplace. To ensure that competition would be vigorous, Congress barred the States from interfering with the choices airlines make regarding the rates and services offered to the public. As the CAB, which played an important role in the drafting and passage of the ADA, noted in 1979, Section 1305 was intended to preempt state interference with "the economic factors that go into the provision of the quid pro quo for a passenger's fare." 44 Fed. Reg. 9948, 9949. As the

CAB explained, "states may not interfere with a federal carrier's decision on how much to charge" and "may not interfere with the services that carriers offer in exchange for their rates." *Id.* Congress knew that preemption would deprive consumers of remedies they would otherwise have under state law. That is what preemption does. But Congress determined that consumers would be better off by making the market for air travel truly competitive.

Having decided that federal law should not hamper free competition for airline passengers, Congress could hardly have intended to allow the States to hobble that competition through the application of restrictive state laws. *See Morales*, 112 S. Ct. at 2034. That is plainly so with respect to statutes such as the Illinois Consumer Fraud Act, as *Morales* held. Innovation would surely be stifled if individual States could impose their own notions of fair dealing, and could impose substantive duties regarding airline rates and services as a sanction for failing to conform to those requirements.

That is no less true with respect to state common law, as the present case amply illustrates. Here, respondents seek to have Illinois courts fix the terms of a contractual relationship on the basis of American's many advertisements and public communications, to decide what duties can be implied from that relationship, and to determine the extent to which American's express reservation of the right to change the AAdvantage program without notice is enforceable. If States are free to impose such duties, in the guise of "interpreting" contracts, airlines will be deterred from offering competitive innovations like frequent flyer programs, particularly if, as here, state common law can give rise to potentially massive unforeseen obligations of unlimited duration.

For example, if Illinois contract law precluded enforcement of American's general reservation of rights clause, then American could never terminate particular routes, no matter how unprofitable they became, until all miles accumulated prior to explicit notice that those routes would be discontinued had been exchanged. If airlines had to anticipate and provide *specifically* for every future contingency, or be subject to suit for breach of implied contractual duties based on state notions of what is fair and reasonable, they would be reluctant to offer new services.

Preemption is also necessary to ensure uniformity, which is itself critical to achieving Congress' procompetitive objective. As this Court recognized in interpreting the cognate ERISA preemption provision, "it is foreseeable that state courts, exercising their *common law* powers, might develop different substantive standards applicable to the *same* . . . conduct, requiring the tailoring of [such] conduct to the peculiarities of each jurisdiction. Such an outcome is fundamentally at odds with the goal of *uniformity* that Congress sought to implement." *Ingersoll-Rand Co.*, 498 U.S. at 142 (emphasis added). Here, the risk that airlines would be subjected to diverse and inconsistent standards is even greater, because air transportation is inherently interstate in character. Every major airline operates in many States. As the experience in Illinois proves, liberal jurisdiction, class action, and choice-of-law rules make airlines amenable to nationwide lawsuits virtually anywhere they do business. Absent preemption, therefore, airlines would inevitably face the risk of manifold and conflicting obligations—a risk that could be minimized only by continually ascertaining and meeting the changing statutory and common law requirements of the most restrictive state. *See also Kalo Brick & Tile Co.*, 450 U.S. at 324. Even assuming airlines could do that, the result would be that instead of differentiating their operations in innovative ways, all airlines would be forced to conform their operations to the most restrictive state

standards. Airlines would be free to compete under federal law, but forced to conform under state law.

Indeed, the present case proves the wisdom of Congress' choice. Frequent flyer programs are precisely the kind of competitive innovation Congress sought to encourage. DOT has described frequent flyer programs as "an extremely effective marketing practice for differentiating airline services." 1990 DOT Report, at 3. Even respondents acknowledge that American's AAdvantage program is a "marketing tool for American to compete with other airlines for customers." [34] Airlines can, and do, make policy choices regarding the differing mix of benefits and restrictions they will offer in their frequent flyer programs. But respondents now seek to challenge some of those choices as conflicting with state policies.

Barring respondents and others from bringing such challenges will not leave consumers without effective remedies. As Congress envisioned, market forces can be expected to constrain truly unfair or deceptive practices. Airlines cannot afford to alienate consumers through unfair or deceptive practices, particularly on a widespread or systematic basis. Furthermore, as this Court recognized in *Morales*, airlines are subject to a uniform federal regulatory scheme. 112 S. Ct. at 2040. Section 411 of the FAA, 49 U.S.C. App. § 1381, prohibits airline practices that are either "unfair" or "deceptive," or that constitute "unfair methods of competition in air transportation or the sale thereof," and specifically authorizes DOT to enforce the prohibition when enforcement would further "the public interest." [35]

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[34] Brief in Opposition (No. 93-1286), at 3-4; *see* Wolens Complaint, Count I, ¶ 1; Pet. App. 48a-49a.

[35] DOT has ample authority under this provision to "perform such acts, to conduct such investigations, to issue and amend such orders . . . as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this chapter." 49 U.S.C. App. § 1324(a). Congress has also

DOT also has ample authority to compensate consumers for injuries resulting from airline violations of Section 411. DOT can abate civil penalties upon payment of compensation to injured consumers. *E.g. In re Red Lion Inn & Casino*, DOT Order 91-7-36 (July 25, 1991); *In re Tropical Airlines, Inc.*, DOT Order 87-12-43 (Dec. 17, 1987); *Davis Agency, Inc. Enforcement Proceeding*, CAB Order 83-1-99 (Jan. 26, 1983).

Furthermore, Congress gave DOT express statutory authority to order airlines to pay "appropriate compensation . . . as prescribed by" DOT, for "failure on the part of such carrier to perform air transportation services in accordance with agreements therefor." 49 U.S.C. App. § 1371(q)(2).[36] The section authorizes the Civil Aeronautics Board (now DOT) to require any certificated air carrier "to file a performance bond or equivalent security arrangement, in such amount and upon such terms as the

established standards and procedures for DOT enforcement actions, 49 U.S.C. App. § 1482, and specified various types of relief that can be awarded. 49 U.S.C. App. § 1471 (authorizing civil penalties up to $10,000 per violation); *id.* § 1471(a) ("each flight with respect to which such violation is committed . . . shall constitute a separate offense"); 49 U.S.C. App. § 1482(c) (authorizing cease and desist orders). Enforcement procedures and mechanisms are set forth in detailed regulations. *E.g.*, 14 C.F.R. § 302.200(b) (authorizing informal written complaints for acts or omissions "in contravention of any provision of the act or any requirement established pursuant thereto"); 14 C.F.R. § 302.201 (authorizing "any person" to make a formal complaint alleging a violation of regulations and requesting agency enforcement).

[36] Congress intended the remedy authorized by this section to expand CAB's previous authority to regulate charter carriers, and, moreover, Congress expanded CAB's remedial authority at the same time as it enacted Section 1305, the express preemption clause. The fact that Congress gave a federal agency, and only a federal agency (CAB, now DOT), express authority to determine "appropriate compensation" for breach of contracts between airlines and passengers is an additional structural confirmation that Congress intended Section 1305 to preempt *state* law remedies for breach of such contracts.

Board shall prescribe," in order to ensure that "travelers" will receive "appropriate compensation . . . as prescribed by the *Board*," for breach of contractual agreements between the traveler and the carrier. *Id.* (emphasis added).[37]

Thus, Section 411 (49 U.S.C. App. § 1381) and 49 U.S.C. App. § 1371(q)(2) provide ample authority for the DOT to protect consumers should DOT determine such protection is needed. DOT has aggressively enforced Section 411 against airlines that have, in DOT's view, provided inadequate notice of capacity controls and blackout dates on discount fares. *See In re Continental Airlines, Inc.*, DOT Order 93-10-49 (Oct. 29, 1993); *In re Icelandair*, DOT Order 93-2-25 (Feb. 9, 1993). DOT could equally enforce Section 411 against airlines that have, in DOT's view, provided inadequate notice of capacity controls in frequent flyer programs.

Unlike the States, however, DOT must act consistently with the procompetitive policies of the ADA. The ADA itself specifically instructs that DOT "shall consider the following, among other things, as being in the public interest:"

> —The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air trans-

[37] Since enactment of the ADA, the CAB and the DOT have on many occasions exercised that authority to require air carriers to post performance bonds. *See*, for example, CAB Order 99-1-28 (Jan. 19, 1979); CAB Order 79-2-22 (Feb. 6, 1979); CAB Order 79-11-116 and 79-9-68 (Sept. 27, 1979); CAB Order 81-9-105 (July 28, 1981); CAB Order 81-8-175 (Aug. 28, 1981); CAB Order 82-3-27 (Dec. 11, 1981) (requiring $1,000,000 bond); CAB Order 84-8-40 (Aug. 9, 1984), *rev'd on other grounds*, *First American Bank v. Dole*, 763 F.2d 644 (4th Cir. 1985); DOT order directing Braniff International to establish and file with DOT "an escrow account containing $6 million, or a surety bond in that amount." (April 2, 1992 letter from Jeffrey N. Shane to J .E. Murdock III, "Actions Required by Braniff International," at 2 (lodged with the Clerk of the Court)).

portation system and (B) to encourage efficient and well-managed carriers to earn adequate profits . . .

—The encouragement, development and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices and to determine the variety, quality, and price of air transportation services.

49 U.S.C. App. §§ 1302(a)(4) and (a)(9). Thus, in regulating allegedly unfair and deceptive airline practices, DOT must by law accommodate the ADA's procompetitive goals. DOT's views regarding the reasonableness of airline competitive practices warrant "substantial deference" because DOT "is equipped, *as courts are not*, to survey the field nationwide, and to regulate based on a full view of the relevant facts and circumstances." *Northwest Airlines, Inc. v. County of Kent*, 114 S. Ct. 855, 863 (1994) (emphasis added). DOT has both the duty and the expertise to police airline frequent flyer practices in a manner that is fair to consumers *and* consistent with the core policy objectives of the ADA.

In contrast, absent preemption under Section 1305, each State could entertain statutory or common law challenges to airline operations, and those challenges would be resolved without regard to their effect on competition.[38] DOT is required by law to strike an appropriate *balance* between the risks of unfair or deceptive practices and the need for a competitive and financially sound airline in-

[38] In deciding whether plaintiffs had established the elements of their state law claims, state coutrs could also ignore other important considerations federal agencies would be required to consider, such as the effect of a finding of liability on airline safety. For example, airlines know that the FAA and the DOT would encourage them to cancel particular flights if they had serious concerns about the safety of those flights. In state lawsuits by passengers whose flights were canceled, however, concerns about safety might not be a defense to a breach of contract action.

dustry. But States could choose to sacrifice competition, and to ignore the financial well-being of the airline industry, in an effort to eliminate even remote risks of consumer injury.

This point is forcefully illustrated by DOT's recent consideration of challenges to airline frequent flyer programs, *including challenges to the specific changes to the AAdvantage program that are at issue here. See* 1992 DOT Order 92-5-60 (May 29, 1992); Pet. App. 85a. The complaint alleged that several airlines had engaged in deceptive and unfair trade practices by providing "inadequate notice," as prescribed by the "NAAG Guidelines," that the airlines reserved the right to impose capacity control restrictions and blackout dates. Pet. App. 96a, 88a. The complaining parties referred specifically to *this case*, which was then pending in the lower courts in Illinois, as "the most significant [case] to this petition," Petition in Docket No. 47539, at 52-53 (citing and discussing *Wolens*). In their list of "changes in frequent flyer programs" that were allegedly unfair, deceptive, and imposed without adequate notice, they *expressly* referred to the changes American announced in May of 1988 that were, and *are*, the subject of this litigation.[39] DOT rejected those claims because the evidence failed to show "actual or potential deception," and there was no showing that "the actual notice given by any carrier is in fact inadequate." Pet. App. 97a. And DOT specifically found that capacity controls are not unfair to consumers. To the contrary, DOT concluded that capacity controls "[ap-

[39] Petition in Docket No. 47539, Appendix 3, at 2:

07/88 AAdvantage mileage devalued under guise of making it easier to earn awards: AA institutes a two-tier award strutcure that drastically raises earning levels for awards not subject to advance booking and capacity controls (AAnytime Awards); puts advance booking and severe capacity controls on Plan AAhead Awards, which are easier to earn.

Relevant excerpts from the papers filed in that proceeding have been lodged with the Clerk of the Court.

pear] to be legitimate methods for controlling the cost of frequent flyer [programs]," without which airlines might be forced to "terminate or cut back the programs" to the great detriment of consumers. Pet. App. 100a. In so ruling, DOT rejected the argument that Section 411 should be enforced without regard to its effects on competition in the market for air transportation services. As DOT held, "[a]dopting the more expansive interpretation of Section 411 proposed by the Association would frustrate Congress' decision that the public will benefit if airline fares and services are determined by market forces rather than government regulation." Pet. App. 101a (citations omitted).

Thus, failure to preempt respondents' claims would mean that the *same conduct* that has been found lawful by the DOT, and a legitimate method of competition under federal law, could nevertheless be challenged under state law, regardless of the effect such a challenge would have on American's ability to compete.

More generally, Congress and the DOT can be expected to act should any genuine threat to consumers arise. The airline industry is subject to intense and ongoing federal oversight. Four months after *Morales* was decided, Congress created the National Commission to Ensure a Strong Competitive Airline Industry,[40] and specifically directed the Commission to scrutinize frequent flyer programs.[41] After "careful examination," the Commission recommended no changes regarding "frequent flyer programs." [42] Nor did the Commission recommend any change in the scope of Section 1305 in light of *Morales*. Shortly thereafter, the Executive branch undertook its own study of the airline industry, culminating in a report entitled *The Clinton Administration's Initiative to Promote A Strong Competitive Aviation Industry* (U.S. Dep't of Transportation, Jan. 6, 1994). That report did not recommend any changes in the scope of preemption under Section 1305. Thus, Congress and the Administration are closely scrutinizing the airline industry, and can readily take any steps needed to protect consumers. They have not done so because frequent flyer programs provide substantial benefits to consumers, and airlines administer those programs fairly.

[40] The Commission was created by Section 204(b) of the 1922 Airport Act, *supra* note 4.

[41] It directed the Commission to "specifically investigate and study . . . (3) LEGAL IMPEDIMENTS TO A FINANCIALLY STRONG AND COMPETITIVE AIRLINE INDUSTRY.—Whether or not the Federal Government should take any legislative or administrative actions to improve the financial condition of the airline industry or to enhance airline competition, including whether or not any changes are needed in the legal and administrative policies which govern— . . . (D) frequent flier programs." *Id.*, § 204(d)(3)(D).

[42] Change, Challenges and Competition: A Report to the President and Congress, The National Commission To Ensure A Strong Competitive Airline Industry (August 1993), at 3.

CONCLUSION

The decision of the Illinois Supreme Court refusing to preempt respondents' damage claims should be reversed.

Respectfully submitted,

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